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RECEIVED

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U.S. EPA REGION 5
OFFICE OF REGIONAL ADMINISTRATOR

Mr. Thomas V. Skinner
Regional Administrator
United States Environmental Protection Agency
Region V
77 West Jackson Boulevard
Chicago, Illinois 60604-03590

Re: Indiana Department of Environmental Management (IDEM)
Federally Authorized NPDES Program

Dear Administrator Skinner:

By your letter of January 28, 2002, a copy of which is enclosed, you invited a description be provided to Region V EPA of matters raised by my Client, Councillor Beulah Coughenour ("Councillor Coughenour"), in her letter to you of January 4, 2002, which caused her to question the adequacy of IDEM's federally authorized NPDES program. Councillor Coughenour has requested me to undertake that charge in this letter.

Part 25 of Title 40 of the Code Federal Regulations (40 CFR, Part 25) addresses public participation under the Clean Water Act ("CWA"), including Section 25.2(a)(2) which specifically applies to EPA issuance and modification of permits. In 40 CFR §25.3, EPA states as its policy and objective that "EPA, State, interstate, and substate agencies carrying out activities described in §25.2(a) shall provide for, encourage, and assist the participation of the public. The term, 'the public' in the broadest sense means the people as a whole, the general populace * * *."

The public participation policy and objective of EPA are incorporated by EPA as requirements that State programs must meet to obtain approval for their NPDES programs under the CWA. 40 CFR §123.1.

"All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State

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will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes."

40 CFR §123.30 (emphasis supplied).

The pleadings filed by IDEM before the Indiana Office of Environmental Adjudication in The Matter of Objections to The Issuance of Permit Approval No. In 0023183 (Belmont Permit) and Permit Approval No. In 0031950 (Southport Permit) City of Indianapolis (Cause No. 01-W-J-2815) demonstrate IDEM's noncompliance with 40 CFR §123.30 and its continuing intent not to comply with this requirement. See the attached Exhibit 1 which contains the filings of IDEM seeking dismissal of affected parties and the responsive pleadings filed by such affected parties. If IDEM were successful in its Motion to Dismiss in this proceeding, only the permittee would be able to obtain judicial review, in irrefutable contravention of 40 CFR §123.30.

IDEM's State program must be revised in light of Section 402(q) of the CWA.

"(e) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR part 403 (pretreatment) shall be accomplished as provided in 40 CFR 403.10. * * *"

40 CFR §123.62. Section 402(q) of the CWA establishes as federal law EPA's 1994 National CSO Policy. IDEM has taken the rather interesting position (see the IDEM filings in Exhibit 1 hereto) that it has the authority to enforce and apply Section 402(q). Apart from the fact that this legal position would emasculate Federalism-- a position presumably not shared by the Governor or Attorney General-- it ignores the inherent contradiction in this position, to-wit, there would be no need for a State program if a State could merely enforce federal law. See 40 CFR §123.23. The problem for IDEM, of course, is that it has never adopted as Indiana law a requirement comparable to the 1994 National CSO Policy. The 1996 State CSO Strategy, merely a policy document, does not have the force and effect of law and has not been adopted as a rule in accordance with applicable Indiana legal requirements.

The EPA State Program requirements are clear, and the inadequacies detailed above are

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sufficient-- indeed militate-- for the withdrawal by EPA of the IDEM federally authorized NPDES program.

"The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part [40 CFR, Part 123], and the State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(I) Failure of the State to promulgate or enact new authorities when necessary; or

* * *

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(I) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

* * *

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits."¹

In light of these serious inadequacies, deficiencies which fatally infect IDEM's federally authorized NPDES program, EPA must initiate actions for the withdrawal of this Program.

"(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program.

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in §§ 123.63

¹The failure of IDEM to complete a triennial review of the water quality standards for more than nine years also triggers the applicability of this requirement.

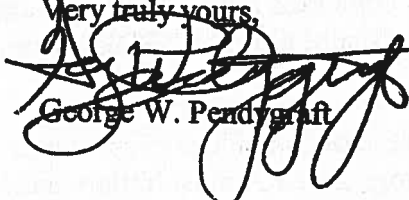
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(or, in the case of a sewage sludge management program, §§ 501.33 of this chapter). The Administrator will respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph will fix a time and place for the commencement of the hearing and will specify the allegations against the State which are to be considered at the hearing. Within 30 days the State must admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program will have the burden of coming forward with the evidence in a hearing under this paragraph."

40 CFR §123.64 (emphasis supplied).

Councillor Coughenour has sought to bring these inadequacies to IDEM's attention, as demonstrated by the filings on her behalf that are included in Exhibit 1 hereto. IDEM has refused to correct these inadequacies and continues to take actions that (a) would deny public participation in NPDES administrative proceedings and (b) enforce as law a public policy document not having the force and effect of law.

Very truly yours,



George W. Pendygraft

c.: Councillor Beulah Coughenour (w/o enc.)
Councillor Lance Langsford (w/o enc.)
Governor Frank O'Bannon (w/enc.)
Attorney General Steve Carter (w/enc.)
IDEM Commissioner Lori Kaplan (w/enc.)